INDEX.

	Page.
THE PARTIES	1
THE FACTS	2–5
THE CONTENTION OF COMPLAINANTS	5–6
(1) That under section 2347, Revised Statutes, the maximum price of coal lands is $20 per acre; no right to sell coal lands at a higher price	5
(2) Incidentally, the withdrawal or reservation which defeated the first application to purchase was unauthorized and invalid	5
(3) Their prayer is that injunction issue restraining the defendants from (*a*) carrying out the orders of the Secretary of the Interior and the Commissioner of the General Land Office requiring defendants to exact a higher price for the land than $20, (*b*) that defendants be compelled to allow complainants to purchase the land for $20 per acre, and (*c*) that defendants be restrained from receiving the application of any other person for the lands	5–6
THE CONTENTION OF DEFENDANTS	6–7
(1) That it appears on the face of the bill that the title to the land sought to be acquired is in the United States, and that the proceedings to acquire that title are still *in fieri*, in the only forum, i. e., the Land Department, appointed by law to adjudicate such matters, involving, as they do, the exercise of judgment and discretion; and that the courts are therefore without jurisdiction to interfere, in equity or at law, by review or otherwise, with the exercise of that judgment and discretion	6

74170—13——1

THE CONTENTION OF DEFENDANT —Contd. Page.

(2) And that were it otherwise, that is, if the local officers, the defendants in this suit, owe merely a plain ministerial duty which they are neglecting to perform, the remedy is at law, in mandamus, and not in equity. 6

(3) That it further appears, on the face of the bill, that complainants, if they were wronged by the action of the register and receiver (the defendants) have not exhausted their remedy by resort to the process authorized by law and accorded by the regulations of the Land Department in the disposition of public lands..... 6

(4) That the action of the local land officers in requiring the payment of the price fixed by the Land Department was in accordance with the law..... 6–7

(5) That the question of the validity of the reservation or withdrawal is not in this case. That question was litigated by complainants before the Land Department, decided against them, and abandoned. This suit is based upon a second—an independent—application of complainants to enter the land; an application based upon the appraised price..... 7

ARGUMENT..... 7–21

(1) It appears on the face of the bill that the title to the land sought to be acquired is in the United States, and that the proceedings to acquire that title are still *in fieri*, in the only forum, i. e., the Land Department, appointed by law to adjudicate such matters, involving, as they do, the exercise of judgment and discretion; and that the courts are, therefore, without jurisdiction to interfere in equity or at law, by review or otherwise, with the exercise of that judgment and discretion..... 7–10

Brown v. *Hitchcock*, 173 U. S. 433, 476–478.

Knight v. *Land Association*, 142 U. S. 161.

ARGUMENT—Continued. Page.

Litchfield v. *Register and Receiver*, 9 Wall. 575.

Naganab v. *Hitchcock*, 202 U. S. 473.

Oregon v. *Hitchcock*, 202 U. S. 60.

Roberts v. *United States*, 176 U. S. 221.

United States ex rel. *Ness* v. *Fisher*, 223 U. S. 683.

United States ex rel. *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316.

United States v. *Schurz*, 102, U. S. 373, 396.

(2) Were it otherwise, that is, if the local officers, the defendants in this suit, owe merely a plain ministerial duty which they are neglecting to perform, the remedy is at law, in mandamus and not in equity..... 11–12

(3) It further appears, on the face of the bill that complainants, if they were wronged by the action of the register and receiver (the defendants) have not exhausted their remedy by resort to the process authorized by law and accorded by the regulations of the Land Department in the disposition of public lands..... 12

(4) The action of the local land officers in requiring the payment of the price fixed by the Land Department was in accordance with the law..... 12–18

Binns v. *United States*, 194 U. S. 486, 495.

Commonwealth v. *Brown*, 210 Pa. St. 29, 34 Atl., 279.

Drake v. *The State*, 5 Tex. App. 649.

Hankins v. *The People*, 106 Ill. 628, 634.

Maxwell v. *Dow*, 176 U. S. 581, 601.

Rusch v. *The City of Davenport*, 6 Iowa, 443, 454.

Stewart v. *Griswold*, 134 Mass. 391.

Stewart v. *Lehigh Valley R. R. Co.*, 38 N. J. Law, 505, 517.

ARGUMENT—Continued Page

Stimson v. *Pond*, 23 Fed. Cas. No. 13455.

United States v. *Freight Association*, 166 U. S. 290.

United States v. *Trinidad Coal and Coking Co.*, 137 U. S. 160.

Worth v. *Peck*, 7 Pa. St. 268.

(5) The question of the validity of the reservation or withdrawal is not in this case. That question was litigated by complainants before the Land Department, decided against them, and abandoned. This suit is based upon a second—an independent—application of complainants to enter the land; an application based upon the appraised price..... 18–21

CONCLUSION 21

(1) The decree of the Circuit Court should be affirmed 21

In the Supreme Court of the United States.

OCTOBER TERM, 1912. No. 156.

WILLIAM G. PLESTED AND CHARLES BEUCHAT,
Appellants,

v.

SAMUEL A. ABBEY AND JOHN J. LAMBERT,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

BRIEF FOR APPELLEES.

This is an appeal from a decree of the Circuit Court of the United States for the District of Colorado. That court sustained a demurrer to the bill of complaint and dismissed the same.

THE PARTIES.

The parties complainant are William G. Plested and Charles Beuchat, persons entitled, under section 2347 of the Revised Statutes, to enter coal lands of the United States.

The parties defendant are Samuel A. Abbey and John L. Lambert, register and receiver, respectively, of the local land office of the United States at Pueblo, Colo.

THE FACTS.

The material facts, as alleged in the bill of complaint, are that on March 23, 1907, complainants took possession of certain lands of the United States, containing 240 acres, in Las Animas County, Colo., and then and there discovered and began the development and improvement of certain coal measures on the lands, and opened a coal mine thereon; that, within 60 days thereafter, complainants filed in the local land office of the United States at Pueblo, Colo., what is known as a coal declaratory statement, under the provisions of section 2349 of the Revised Statutes, claiming the preference right of entry provided by section 2348 of the Revised Statutes; that, thereafter, and on July 1, 1907, complainants tendered to defendants the sum of $20 per acre for said lands, a total of $4,800, and then and there made their application to enter said lands under the provisions of section 2350 of the Revised Statutes; that the declaratory statement and the application of complainants were rejected by defendants for the reason that the lands had been with other lands, by executive order, theretofore reserved and withdrawn from disposition under the coal-land laws; that, from this action of defendants, complainants duly appealed to the Commissioner of the General Land Office, and, on March 30, 1908, the action of defendants was affirmed; from this judgment of the Commissioner of the General Land Office complainants duly appealed to the Secretary of the Interior, and, on January 30, 1909, the action and judgment of the two lower tribunals was affirmed by the Secre-

tary on account of said reservation and withdrawal, which had been made July 26, 1906.

Nothing further was done in the matter until June, 1910, when the lands, with other lands, were, by the Secretary of the Interior and the Commissioner of the General Land Office, duly classified and designated on the books and records of the Land Department as coal lands, and were restored to entry at certain appraised prices. On June 28, 1910, defendants advised complainants of the restoration of the lands and of the classification, prices, etc., thereof, telling complainants that the price was $125 per acre for certain portions thereof, $135 for certain other portions, and $115 for the remainder, amounting in all to $30,000 (R., 4, 9), and that the complainants would be allowed 60 days from the receipt of the letter in which to apply to purchase the lands, in accordance with the coal-land laws and regulations; that thereafter, on July 22, 1910, complainants filed with defendants their written application for the purchase of said lands "in accordance with the provisions of section 2347 of the Revised Statutes of the United States and in accordance with the rules and regulations and upon the forms prescribed by the Interior Department in such cases" (R., 4); that, thereafter, on July 26, 1910, complainants were advised by defendants to give the proper notice of their application, which was done (R., 4).

Complainants having thus been advised on June 28, 1910, of the restoration of the lands and of the prices thereof, and having, thereafter, duly made

their application therefor and proceeded under the regulations to perfect the same, were in a position to complete the purchase of the lands and acquire the title thereto. Instead of doing that, they, thereafter, again wrote the defendants asking them what price would be required for the lands, and, in response thereto, were advised by letters from defendants of September 9 and 12, 1910 (R., 5, 12, 13), that the price would be as stated in prior letter of June 28, 1910, aggregating $30,000, and that they would be allowed 30 days from September 9, 1910, to pay the money, "failing in which your application will be rejected," and notifying them to file, within that time, proof of the continuous posting of the notice on the land, and "if all is regular will pass to final entry upon receipt of the money."

It is then alleged that, on September 22, 1910, complainants applied to defendants to finally enter and purchase the lands for the sum of $20 per acre, a total of $4,800, and tendered to the defendant Lambert the said $4,800, but that he refused to accept the same, and defendants refused to allow said entry except upon the payment of the appraised price, $30,000. (R., 7.) (It will be noted that this was the price at which the lands were offered to them by the letter of June 28, 1910, and pursuant to which they made their application to purchase.)

It is further alleged that defendants declared their intention to reject complainants' application on or before October 13, 1910, unless said price of $30,000 was paid.

Thereupon, and on September 26, 1910, this suit was commenced in the circuit court. The record discloses no further proceedings taken before the defendants or the Land Department, and complainants therefore failed and refused to proceed in the regular manner by obtaining a judgment of defendants and appealing therefrom in the ordinary course to the Commissioner of the General Land Office and the Secretary of the Interior, and thus exhaust their remedies in the Department of the Interior, the proper tribunal and the one exclusively provided by law for the adjudication of such questions.

THE CONTENTION OF COMPLAINANTS.

The contention of complainants is that, under section 2347, Revised Statutes, the maximum price for the lands in question is $20 per acre, and that the Land Department has no right nor power to sell coal lands at a higher price; and, incidentally, that the withdrawal or reservation which defeated their first application was unauthorized and invalid. They pray in their bill of complaint that a writ of injunction issue restraining the defendants from carrying out the orders of the Secretary of the Interior and the Commissioner of the General Land Office requiring defendants to exact the appraised price for the lands, and that the defendants be compelled to accept the application of complainants and allow them to enter and purchase the land upon the payment of the sum of $20 per acre; and that

defendants be restrained from receiving or accepting the application of any other person for the entry of the lands. (R., 8.)

THE CONTENTION OF DEFENDANTS.

It is respectfully submitted that the judgment below should be affirmed, for the following reasons:

(1) That it appears on the face of the bill that the title to the land sought to be acquired is in the United States, and that the proceedings to acquire that title are still *in fieri*, in the only forum, i. e., the Land Department, appointed by law to adjudicate such matters, involving, as they do, the exercise of judgment and discretion; and that the courts are therefore without jurisdiction to interfere, in equity or at law, by review or otherwise, with the exercise of that judgment and discretion.

(2) And that were it otherwise, that is, if the local officers, the defendants in this suit, owe merely a plain ministerial duty which they are neglecting to perform, the remedy is at law, in mandamus, and not in equity.

(3) That it further appears, on the face of the bill, that complainants, if they were wronged by the action of the register and receiver (the defendants), have not exhausted their remedy by resort to the process authorized by law and accorded by the regulation of the Land Department in the disposition of public lands.

(4) And, finally, that the action of the local land officers in requiring the payment of the price fixed

by the Land Department was in accordance with the law.

(5) The question of the validity of the reservation or withdrawal is not in this case. That question was litigated by complainants before the Land Department, decided against them, and abandoned. This suit is based upon a second—an independe application of complainants to enter the land; an application based upon the appraised price.

ARGUMENT ON ABOVE POINTS.

I.

Little need be said by way of argument in support of the proposition on which the court below decided the case against the appellants. (R., 22.) This court has over and over again decided the points upon which that decision rests.

In *Brown* v. *Hitchcock*, 173 U. S. 433, 476–478, the court said:

> Until the legal title to public lands passes from the Government, inquiry as to all equitable rights comes within the cognizance of the Land Department.

In *United States* v. *Shurz*, 102 U. S. 378, 396, it was said:

> Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the Government conveyed to the citizen. This Court has, with a strong hand, upheld the doctrine that so long as the legal title to these lands remains in the

> United States, and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere.

To the same point are *United States* ex rel. *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316; *Knight* v. *Land Association*, 142 U. S. 161; *Oregon* v. *Hitchcock*, 202 U. S. 60; *Naganab* v. *Hitchcock*, 202 U. S. 473; and the very recent decision in *United States* ex rel. *Ness* v. *Fisher*, 223 U. S. 683.

The defendants are local land officers—the court of first instance in the juridical organization of the Land Department. They are subject to the supervisory authority of the Secretary of the Interior. The latter, within his jurisdiction, fixes the selling price of coal lands. Information of these prices is conveyed to the local land officers, and, under instructions from the Secretary of the Interior, it is their duty in disposing of such lands to exact the prices so fixed. They have no discretion in the matter. If an applicant to purchase coal lands believes that the price fixed by the Secretary is too high, or, on the other hand, believes that the Secretary has no power under the law to fix any price beyond $20 per acre, that is a matter which he should take up with the Secretary himself. And the proper and orderly way provided by the law for him to do it is to appeal to him from a judgment which the local land officers may render in the matter.

The legal title to the land is indisputably in the United States. Complainants are just at the thresh-

old in the process of obtaining title. They are confronted by a decision, an attitude, a demand—whatever one may be pleased to call it—adverse to their contention as to the requirements of the coal-land law, but which, they concede, is taken by the defendants pursuant to the instructions given by superior officers.

In paragraph 16 of the bill (R., 6), it is stated that the rights of the complainants and the action of the defendants involve a construction of section 2347 of the Revised Statutes. Instead of proceeding with the case to the defendants' superior officers by the usual appeal they switch off, so to speak, and invoke a court to interfere—to substitute itself for the head of the Land Department in supervising and controlling the conduct of defendants in a case involving the disposition of a part of the public domain under the public-land laws.

The case is strongly suggestive of *Litchfield* v. *Register and Receiver*, 9 Wall. 575, where, as here, the plaintiff sought to secure the interference of a court with matters confided by law to the jurisdiction of the local officers in the first instance, and then, on appeal, to the higher officers of the Land Department. As the court epitomized it, on page 578:

> He (appellant) says the court below erred because it did not require them (the register and receiver) to come in and answer to his claim of title, and at their expense to put the court in possession of their views, and defend their instructions from the Commis-

> sioner, and convert the contest before the Land Department into one before the court. This is precisely what this court has decided that no court shall do.

That case was cited with approval by this court in *United States* ex rel. *Ness* v. *Fisher, supra,* wherein the court held (syllabus):

> Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with *quasi* judicial functions, to which is confided the execution of the laws regulating the disposal of the public lands.
>
> A decision of an executive officer, made in the discharge of a duty imposed by such a law, and involving the exercise of judgment and discretion, may not be reviewed by mandamus, nor can he be compelled by that means to retract his decision so made and to give effect to another not his own and having his approval.

On the question as to whether the action of the officers of the Land Department in matters of this kind is discretionary or ministerial, complainants, in support of their contention that it is simply ministerial, rely (brief, p. 24) on the case of *Roberts* v. *United States,* 176 U. S. 221, and quote therefrom at length. On this it is sufficient to quote the following language from the opinion of the court in the *Ness* case, *supra:*

> The relator seems to believe that *Roberts* v. *United States,* 176 U. S. 221, * * * in some way qualifies the rule so stated; but this is a mistaken belief.

II.

The only conceivable ground for the intervention of a court is that defendants are neglecting the performance of a clear ministerial duty which, under the law, they owe these complainants.

Complainants contend that they have done all things required of them by law, and have paid all fees and have tendered the sale price required by law (R., 8), and yet the defendants are refusing to permit their purchase of the land unless they pay another sum which they demand but which is unauthorized by law, and that the duty owed is affirmative, positive, in its nature—the duty to accept the sum tendered and to issue such papers as the law and regulations may require.

The remedy in that event is in a court of law, mandamus. The bill fails to show a cause cognizable in equity. Mandamus would afford every remedy to which complainants can claim to be entitled.

It might be observed in passing that complainants' bill emphasizes the debatable nature of the alleged duty. In other words, we certainly have not a situation where a clear, plain, unmistakable duty is perspicuous—the question being whether or not the performance of that duty is neglected or refused. In this case, first of all, it must be decided whether or not the defendants owe any such duty as complainants contend exists, *i. e.*, to obey complainants and accept $4,800 for the land, or to obey the regulations and instructions of their superior officers and require $30,000 for the land.

This brings us to the third proposition upon which we urge affirmance of the judgment below:

III.

That is, if defendants are derelict in the discharge of a duty, there is a forum, constituted by the law, before which that question may be tried—the Land Department. The rules and regulations provide in all instances an appeal by the injured party from the action of the register and receiver to the Commissioner of the General Land Office and ultimately to the Secretary. The bill fails to show that complainants unsuccessfully availed themselves of this right. Rather than exhausting the remedy afforded by law, they fail to show that they ever even invoked it. Not satisfied that the proper officers to supervise the conduct of the defendants in administering the land laws are their superior officers in the Land Department, complainants seek to endow a court with that supervisory power—and immediately solicit its exercise.

We respectfully suggest that this suit is premature—at least.

IV.

On page 17 of complainants' brief, they say:

> If it is lawful for the defendants to demand the sum of $30,000.00 for these lands, then we admit we have no standing in court.

The law is explicit; the language of the act is by no means uncertain; we can not see any room for con-

struction. Section 2347, Revised Statutes, authorized the sale of coal land at "*not less than* $10 per acre" for lands situate beyond a certain distance from a railroad and "*not less than* $20 per acre" for land situate within that distance. Section 2351 authorized the Commissioner of the General Land Office to issue all needful rules and regulations for carrying into effect the provisions of sections 2347, 2348, 2349, 2350, and 2351. Section 2347 was not self-executing. *A* price was not fixed by Congress—merely a *minimum* price was stated below which the Land Department could not go in selling the lands. It remained for the Land Department to fix *the* price—which it did, adopting the lowest price it could within the law. The regulations and decisions cited on pp. 30–31 of complainants' brief were not in *construction* of the coal-land law, but in *administration* of it. The excerpt from the regulations of July 31, 1882, quoted on page 30 of their brief, illustrates the point. The department fixed a price—"the price per acre *is*," etc. That price prevailed for many years until a more businesslike method of classifying lands and fixing prices, graduated by the value of the several tracts, was adopted—adopted, too, according to complainants' own allegations in the bill of complaint, before they ever went on the land in the first place. (R. 6; par. 16, bill.)

Complainants, mistaking this *administration* of the law for a *construction* of it favorable to their contentions, make the further point (brief, p. 31) that this court has held that a construction placed upon a

statute by an executive department is entitled to great weight and will be respected by the courts unless obnoxious to the plain provisions of the statute, and if doubtful will not be overruled except for cogent reasons. We have no quarrel with this doctrine. This case is a good place to apply it. We ask the court to respect the construction and administration of the law as had by the Land Department and approve it.

"Not less than" in ordinary parlance is of unmistakable meaning. There can be no confusion as to its meaning when introduced into legislation. It is employed over and over again in fixing a minimum—a minimum fine, a mimimum wage, etc. There is no such ambiguity as will justify resort to the legislative history of the bill later crystallized into an act or a law to reveal the esoteric intent of the legislators, as where words have been employed susceptible of varied meanings.

Complainants refer to portions of the debates in Congress as determinative of the proper construction to be placed upon these words. But, as stated above, they need no *construction*. They speak for themselves. If the provisions of a statute are plain and unambiguous, the courts must accept them as they are declared; otherwise, they would usurp the functions of the legislative department of the Government. But, even were there some ambiguity here—

> there is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to

discover the meaning of a statute passed by that body. *United States* v. *Freight Association*, 166 U. S. 290, 318; *Binns* v. *United States*, 194 U. S. 486, 495.

What individual senators or representatives may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, or bill or resolution, does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which the members voted in adopting it. *Maxwell* v. *Dow*, 176 U. S. 581, 601.

In respect to coal-land legislation, the two acts of July 1, 1864 (13 Stat. 343), and of March 3, 1865 (*id.*, 529), both fixed minimum prices, the first act contemplating bids with sale to the highest bidder, the lowest bid authorized to be considered being $20. The excerpts in complainants' brief (pp. 36, *et seq.*) indicate the diversity of ideas as to the value of such lands, some even intimating that $100 was the proper minimum for some tracts. If the legislative history of Revised Statutes, section 2347, shows anything at all, it is in emphasis of the proposition that the Secretary of the Interior must not dispose of the land at prices less than those named in the act, leaving the maximum to be governed by the ordinary rule of business. If this be not so, the words "not less than" are absolutely meaningless. If appellants' contention possesses aught of merit, Congress might easily have said that a properly qualified person should have the right to enter "upon payment to the receiver" of "ten dollars," etc. And this was pre-

cisely what Congress did in the act of April 28, 1904 (33 Stat. 525), in providing for the disposal of coal lands in Alaska, after having attempted (act of June 6, 1900, 31 Stat. 658) to extend the provisions of sections 2347 to 2352, Revised Statutes, to that Territory.

Complainants singularly fall into error in speaking of *construction* placed upon the words in question, not only by the Land Department, but by this court in the case of *United States* v. *Trinidad Coal and Coking Co.*, 137 U. S. 160, cited on pp. 27–29 of complainants' brief. The court merely recited and applied facts. There were then, as now, "fixed" prices; but nowhere did the court settle the question—it was not raised—as to who fixed those prices. Congress, it is true, had fixed a minimum; but *the* price—the price that was the minimum and the maximum, and in short the only price—was that which was fixed by the Secretary of the Interior by circulars and regulations governing the administration of the coal-land laws.

How may "not *less* than" be stretched or distorted into meaning "not *more* than"?

Although these words "not less than" have been so often used in statutes of various kinds, there is a peculiar lack of authority on their construction. As was said by the court, in 1883, in *Hankins* v. *The People*, 106 Ill. 628, 634, speaking of these words:

> On this question of construction of the section under consideration we receive but little aid from adjudged cases.

The court there (p. 632), referring to cases where it had affirmed judgments for fines more than the amount named in the statute, said:

> It is true in neither of those cases was the question under consideration presented or discussed, but they are referred to as showing this question is not so obvious as to have attracted the attention of counsel arguing those cases.

We have industriously examined the books, and the following are the only cases which we can find upon the subject, and they all, with one exception, sustain our view:

> Shall be fined not less than $100.
>
> It fixed the minimum, but fixed no maximum. Had there been an intention to fix that sum as the limit, both as a minimum and a maximum, it appears almost incredible that no language was employed to manifest the intention * * *: *Hankins* v. *The People, supra.*

"Must not be less than 16 feet wide": *Rusch* v. *The City of Davenport*, 6 Iowa, 443, 454.

"Not less than three days": *Stewart* v. *Griswold*, 134 Mass. 391.

"Equal to" includes superior to and means "not less than": *Stewart* v. *Lehigh Valley R. R. Co.*, 38 N. J. Law, 505, 517.

"Not less than $100": *Worth* v. *Peck*, 7 Pa. St. 268.

"Not less than two weekly newspapers," "for not less than four weeks": *Commonwealth* v. *Brown*, 210 Pa. St. 29, 34, 59 Atl. 479.

"Not less than five years": *Drake* v. *The State*, 5 Tex. App. 649.

In each of the above cases the court comes to its conclusion after carefully reasoning out the question. The only case seeming to hold to the contrary is that of *Stimson* v. *Pond*, 23 Fed. Cas. No. 13455. It is, however, as seen above, contrary to the weight of authority, and the reasoning therein, we submit, is not sound. The court there was dealing with a penalty, under an act of Congress, "of not less than $100," and laid great stress upon that fact. An examination of the opinion will, we think, satisfy the court that the conclusion there was erroneous. However, considering the facts of that case, and the basis of the court's reasoning, it would seem that it need not be necessarily considered as authority against our contention here. The case was referred to and considered by the court in *Hankins* v. *The People*, *supra*, wherein they stated their inability to agree with that conclusion.

Query: If the statute read "not more than $20," would complainants then contend that it meant "$20," and "not less than" $20? What a singular way to express precisely $20.

V.

The question of the validity of the reservation or withdrawal is not in this case. This suit is based upon the second—an independent—application of complainants to enter the lands.

When they made their first application it was rejected on account of the reservation or withdrawal, and they regularly proceeded in the proper forum by appealing to the Commissioner of the General Land Office and the Secretary of the Interior; and the judgment of the defendants was affirmed. Thereupon, their first application became absolutely rejected—ended and lifeless for any purpose. This final rejection was January 30, 1909. Complainants, if they had a remedy in the courts, had one then, which it was their duty to pursue, and the proper party defendant was the Secretary of the Interior, or, maybe, the President, but not the local land officers. They took no proceedings, however, but acquiesced in this judgment of the Secretary for a year and a half, when, after the Secretary had classified the lands, and they had been restored to entry, and complainants had been notified thereof and of the price fixed, they, without objection of any kind, applied to purchase the lands and conformed to the regulations and procedure of the Land Department in all respects, and not until they came to make their payment and receive their receipt did they object to the price placed on the land. *Yet, they had applied to enter under the price fixed.*

It will thus be seen that their suit is based solely upon their second application, which was the only one then before the Land Department. The question of the withdrawal has, by their own acquiescence and conduct, passed out of the case, and the only point finally made by them on their second application be-

fore the defendants was that the maximum price of the lands under the law was $20 per acre, and that the Land Department had no right to classify coal lands at any higher price.

Moreover, the defendants were not responsible for the withdrawal. In any suit involving that question the Secretary of the Interior is a necessary party, if he made the withdrawal, and may be the President, if he made it.

The question of the validity of the withdrawal was fully presented and urged by complainants in the Land Department under their first application, and decided against them. They thus exhausted their remedy unless they desired to transfer the question to a court, which they declined to do, but, on the contrary, acquiesced therein and, thereafter, based their whole application to purchase the land upon a condition and situation which arose by virtue of the very revocation of the withdrawal and the restoration of the lands to entry at a fixed price. Their whole case is thus based upon lands not withdrawn or reserved, but lands open to entry and purchase under the coal-land laws, and upon an application to purchase them at the price fixed by the Commissioner of the General Land Office and the Secretary of the Interior. It is important to note that, unlike their first application, this application was not made pursuant to a declaratory statement and the preference right provided in sections 2348 and 2349, Revised Statutes, but was an ordinary application to purchase under section 2347,

Revised Statutes (R., 4, Exhibits B, C, and D, pp. 10, 11); thus showing a clear abandonment of any claim to the land under their first proceeding, which wholly eliminates any question as to the withdrawal.

CONCLUSION.

It is respectfully submitted that the decree of the Circuit Court should be affirmed.

WM. MARSHALL BULLITT,
Solicitor General.

CHARLES W. COBB,
Assistant Attorney General.

JANUARY 23, 1913.

○